No. 77-1207

In the Supreme Court of the United States

OCTOBER TERM, 1977

BARBARA B. BLUM, ACTING COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES AND GABRIEL R. RUSSO, COMMISSIONER OF THE MONROE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONERS

v.

MARTIN TOOMEY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation of April 3, 1978.

QUESTION PRESENTED

As part of its procedures for implementing its Medical Assistance ("Medicaid") program, estab-

lished by Title XIX of the Social Security Act, 42 U.S.C. (and Supp. V) 1396 *et seq.*, the State of New York does not exempt actual work-related expenses from the applicant's income for purposes of determining his eligibility for and level of medicaid assistance; rather New York exempts a standard amount from each applicant's income. In computing income when determining eligibility for its program of Aid to Families with Dependent Children under Title IV of the Act, 49 Stat. 627, as amended, 42 U.S.C. (and Supp. V) 601 *et seq.*, however, New York does exempt actual work-related expenses.

The United States will discuss the question whether this aspect of New York's method of determining eligibility for and extent of medicaid assistance conflicts with Title XIX of the Social Security Act and the implementing regulations promulgated by the Department of Health, Education, and Welfare.[1]

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[1] Petitioners' principal contention (Pet. 5-7) is that the district court lacked pendent jurisdiction over respondent's statutory claims; petitioners rely primarily on *Hagans* v. *Lavine*, 415 U.S. 528. In our view the lower courts properly assumed jurisdiction. *Hagans* establishes that district courts have pendent jurisdiction under 28 U.S.C. 1343(3) of federal statutory claims if the constitutional claim to which they are pendent is " 'patently without merit,' " or not "insubstantial, implausible, foreclosed by prior decisions of this Court or otherwise completely devoid of merit * * *." 415 U.S. at 542-543. None of the reasons or authorities cited by petitioners (Pet. 5-6) establishes or suggests that respondents' equal protection claims are so implausible or completely devoid of merit that the district court would lack jurisdiction over them. Because the court of appeals properly applied the *Hagans* principle, there is no need to hold the petition here

STATEMENT

1. Title XIX of the Social Security Act, as added, 79 Stat. 343, and amended, 42 U.S.C. (and Supp. V) 1396 *et seq.*, creates a Medical Assistance program, commonly known as "medicaid," pursuant to which the states, with federal funds, may reimburse the costs of medical treatment provided (1) to the "categorically needy" (*i.e.*, those persons who receive payments under the cash assistance programs of the Social Security Act, such as the Aid to Families with Dependent Children Program (AFDC)),[2] and (2), if a participating state so chooses, to the "medically needy" (*i.e.*, those individuals, otherwise eligible for categorical assistance, whose income and resources make them ineligible for categorical assistance but whose income and resource are still insufficient to cover the costs of necessary medical care and services). 42 U.S.C. (Supp. V) 1396a(a)(10)(A) and

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pending the Court's decision in *Chapman* v. *Houston Welfare Rights Organization*, No. 77-719, certiorari granted, February 21, 1978, and *Gonzalez* v. *Young*, No. 77-5324, certiorari granted, February 21, 1978, which present the question whether federal courts have jurisdiction of controversies similar to the present one under 28 U.S.C. 1343(3) or (4) in the absence of a colorable constitutional claim.

[2] The present categorical assistance programs are AFDC (Title IV of the Act, 42 U.S.C. (and Supp. V) 601 *et seq.*), the Supplemental Security Income (SSI) program (Title XVI of the Act, 42 U.S.C. (and Supp. V) 1381 *et seq.*), and (in Guam, Puerto Rico and the Virgin Islands) the programs of aid to the aged, blind, and disabled (Titles I, X, XIV, and XVI of the Act, 42 U.S.C. (and Supp. V) 301 *et seq.*, 1201 *et seq.*, 1351 *et seq.*, and 1381 *et seq.*).

(C); 42 C.F.R. 448.1(a)(1) and (2). A "medically needy" person who, but for his income, would be eligible for AFDC assistance is referred to as "AFDC-related." Respondents are AFDC-related persons.

New York is one of the states participating in Title XIX that has chosen to extend medicaid coverage to the medically needy (see N.Y. Social Services Law (N.Y.S.S.L. § 366(1) (McKinney 1978).

States offering medicaid coverage to the medically needy are accorded a range of discretion in fixing the amount of income an assisted family may retain to meet normal living expenses.[3] The statute and implementing regulations require, however, that the state must consider, in fixing the amount of income that may be retained by the AFDC-related medically needy, "all disregards applicable to income * * * which are utilized when determining eligibility * * * under the State's approved title IV-A [AFDC] plan." 42 C.F.R. 448.3(c)(3)(i).[4] See also 42 U.S.C. (Supp. V) 1396a(a)(17). In other words, if a state disregards a person's expenses in commuting to work in determining eligibility for and extent of AFDC payments, it must disregard the same kind of expenses

[3] To qualify for federal matching funds, the state may set that amount at not more than 133 1/3 percent of the state's highest AFDC payment for a family of the same size without income or resources (42 U.S.C. 1396b(f)(1)(B)(i)), and at not less than "the higher of the levels of the payment standards generally used as a measure of financial eligibility in the [categorical assistance] programs." 42 C.F.R. 448.3(c)(1)(ii).

[4] Formerly codified at 45 C.F.R. 248.3 (1976) and recodified effective October 1, 1977 as 42 C.F.R. 448.3 (42 Fed. Reg. 52826-52827).

in determining eligibility for and extent of "medically needy" payments.[5]

2. New York disregards actual expenses incident to employment in computing gross earnings of AFDC recipients for purposes of determining the level of payment to which they are entitled. N.Y.S.S.L. § 131-i (McKinney 1978); 18 N.Y.C.R.R. 352.19. This deduction from gross income of expenses reasonably attributable to the earning of income is required by 42 U.S.C. 602(a)(7), as this Court held in *Shea* v. *Vialpando*, 416 U.S. 251.

For the medically needy, however, New York allows no such deduction. It has established a schedule of standard income exemptions; the exemptions vary only according to the size of the household. N.Y.S.S.L. § 366(2)(a)(8) (McKinney Cum. Supp. 1978); 18 N.Y.C.R.R. 360.5. The existence and extent of actual work-related expenses incurred by members of a medically-needy household are not considered.[6]

[5] A recipient's eligibility for either AFDC or medical assistance and the level of a recipient's assistance are related. For example, if a person is not eligible for assistance under a given program unless his income (after deducting various "disregards") is $5000 or less, the amount of the payments he is entitled to receive will depend on the amount by which his income is less than $5000.

[6] 18 N.Y.C.R.R. 360.5(c)(2)(ix) does provide for disregarding work-related expenses of blind SSI-related medically needy persons. The fact that the named plaintiffs were both AFDC-related and relied on 42 C.F.R. 448.3(c)(3)(i) suggests that relief may have been sought only on behalf of the AFDC-related medically needy. (Petitioners have not, however, challenged in this Court the particulars of the class certification, and the class certified by the district court consists of all "medically needy" persons. Pet. App. 8a.)

Respondents instituted this action for declaratory, injunctive, and monetary relief in the United States District Court for the Northern District of New York, contending that New York's statutes and regulations setting eligibility for and the amount of medicaid assistance to the medically needy conflict with the Equal Protection Clause of the Fourteenth Amendment, Title XIX of the Social Security Act, and federal regulations under the medicaid program.

Finding that a colorable constitutional question had been presented, the district court assumed pendent jurisdiction over respondents' statutory claims (Pet. App. 14a). The court held that N.Y.S.S.L. § 366(2) (McKinney 1978) and 18 N.Y.C.R.R. 360.5(a) "conflict with the Social Security Act and regulations issued thereunder insofar as they do not provide the same disregards or deductions from gross income of all work-related expenses for medically needy as are used to determine eligibility for or the amount of said benefits for AFDC" (Pet. App. 8a). The court of appeals affirmed (Pet. App. 1a-5a), relying on "the requirement of subsections (10)(C)(i) and (17)(B) of 42 U.S.C. § 1396a(a) that the 'medically needy' be treated the same as AFDC applicants with respect to income disregarded for purposes of ascertaining eligibility" (*id.* at 4a). Neither the district court nor the court of appeals reached respondents' constitutional claims.

DISCUSSION

1. New York's statutes, which disregard actual work-related expenses in determining eligibility for,

and payment levels to AFDC recipients but do not disregard the same expenses for determining eligibility for and payment levels to medically needy recipients, are contrary to 42 U.S.C. (Supp. V) 1396a (a)(17), which provides in pertinent part:

> (a) A State plan for medical assistance must—
>
> * * * * *
>
> (17) include reasonable standards * * * for determining eligibility for and the extent of medical assistance under the plan which * * * provide for taking into account only such income and resources as are, as determined in accordance with standards prescribed by the Secretary, available to the applicant or recipient and (in the case of any applicant or recipient who would, except for income and resources, be eligible for [categorical assistance]) as would not be disregarded * * * in determining his eligibility for such [categorical assistance] * * *.

Regulations promulgated under the statute establish the same requirement. 42 C.F.R. 448.3(c)(3) provides in pertinent part (emphasis supplied):

> [W]hen establishing eligibility the State plan must provide for:
>
> (i) * * * consideration of *all* disregards applicable to income and resources which are utilized when determining eligibility * * * under the State's approved [AFDC] plan.

The statute and regulations thus both require state plans to "provide for taking into account only such income and resources * * * as would not be disregarded * * * in determining [the recipient's] eligi-

bility for such [categorical assistance]." In determining eligibility and assistance levels for the medically needy the states therefore must disregard the same items of income that it disregards in determining eligibility and assistance levels for AFDC recipients —including, as in this case, disregards for actual work-related expenses.

The equal deduction requirement reflects a basic purpose of the Medical Assistance program, which was designed to help the working poor *avoid* the necessity of living below a subsistence level because of medical bills. As the Senate Finance Committee stated in recommending adoption of the "spend-down" provision in Title XIX, which allows a person to qualify for medicaid coverage if his payment of medical expenses would reduce his income to the medically needy level[7] (S. Rep. No. 404, 89th Cong., 1st Sess. Pt. 1, p. 79 (1965)):

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[7] 42 U.S.C. (Supp. V) 1396a(a)(17) also provides in part that a state plan must

> provide for flexibility in the application of such standards with respect to income by taking into account, except to the extent prescribed by the Secretary, the costs (whether in the form of insurance premiums or otherwise) incurred for medical care or for any other type of remedial care recognized under State law * * *.

After all appropriate factors have been subtracted, an applicant's income is measured against the participating state's medically needy minimum income level. Those applicants whose countable income is below the medically needy level are automatically eligible for medicaid assistance. Those with countable income above the medically needy level must "spend-down" to establish eligibility, *i.e.*, they must incur medical

> In no event * * * may a State require the use of income or resources which would bring the individual's income below the amount established as the test of eligibility under the State plan. Such action would reduce the individual below the level determined by the State as necessary for his maintenance.

The Secretary's regulations (42 C.F.R. 448.3) accordingly require state medicaid plans to set the minimum amount that the medically needy may retain for normal living expenses at a figure equal to or above the most liberal payment standard generally used in the state's categorical assistance programs (Subsection 448.3(c)(1)(ii)). Subsection 448.3(c)(2) establishes a flexible measurement of available income and subsection 448.3(c)(3)(i) further requires that state plans give the AFDC-related medically needy the advantage of all income disregards that the state uses in determining eligibility under the state's AFDC program. Finally, subsection 448.3(b)(1) requires that a state plan provide only for the consideration of income that is "actually available." In other words, under the regulations, a state may never require a person to become more needy than the categorically needy in order to receive aid under Title XIX.

New York's system poses the very danger that the statute and regulations were designed to avoid. Suppose a state provided that families would be eligible

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expenses in an amount equal to their excess income. 42 C.F.R. 448.3(c)(2); 42 C.F.R. 448.4(b)(5). Any additional medical expenses are absorbed by medicaid.

for AFDC assistance if their income (excluding all disregards) was $5,000 or less and provided that actual work-related expenses would be disregarded. A family with $6,000 in income but $2,000 in work-related expenses would be entitled to assistance; under the state's rules, the $2,000 would be disregarded, and the net income of $4,000 (deemed by the state to be insufficient for subsistence) would be lower than the maximum for eligibility. But if, as the state statute permits, a state also established $5,000 as the qualifying figure for medicaid assistance, but did not, for medicaid purposes, disregard actual work-related expenses, a family could be forced to subsist on less than what the state had determined is necessary for subsistence. Under such a system a family with a $10,000 income, $5,000 in medical bills and $2,000 in work-related expenses would be entitled to no medicaid assistance, notwithstanding that it had only $3,000 of available income. New York's plan does not produce such an extreme result, because it disregards a standard amount for all persons. But because the state disregards a standard amount rather than actual, work-related expenses to compute eligibility, it allows any person whose actual work expenses exceed the standard to fall below the subsistence level.

None of the reasons offered by petitioners justifies this anomalous result. Petitioners' argument that New York's standard exemption system is "reasonable" within the meaning of 42 U.S.C. (Supp. V) 1396a(a)(17) is irrelevant. See, *e.g.*, *Aitchison* v. *Berger*, 404 F. Supp. 1137 (S.D. N.Y.), affirmed, 538

F. 2d 307 (C.A. 2), certiorari denied, 429 U.S. 890, in which the court rejected the same argument by New York and invalidated the State's system of disregarding actual shelter costs for AFDC purposes but disregarding only a standard shelter allowance for medicaid purposes. The statute requires *both* "reasonableness" *and* that the state take into account for the medically needy the same resources that it takes into account for the categorically needy (see page 7, *supra*). New York's program makes no attempt to meet the latter requirement. Furthermore, New York's income exemption system conflicts with 42 C.F.R. 448.3(b)(1) and (c)(1)(ii) because it requires some medically needy persons to spend down below the level of payments to similarly situated recipients of categorical assistance.[8]

Petitioners' reliance on *Rosado* v. *Wyman*, 397 U.S. 397, for the proposition that work-related expenses may be averaged (Pet. 9-10) is unfounded. In *Shea* v. *Vialpando*, *supra*, this Court rejected the same argument in holding that a state's use of a standard exemption for work-related expenses for purposes of determining AFDC assistance conflicted with the ex-

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[8] There is no merit to petitioners' claim (Pet. 7-9) that the standard exemption approximates actual work expenses. Petitioners cite (Pet. 8) N.Y.S.S.L. § 366 (McKinney 1968) and implementing regulations to show that the state's system is designed to "make allowance for the number of wage earners in a household", but petitioners overlook the fact that that provision has been repealed. See McKinney's 1968 Session Laws of New York, c. 32, § 1. The current § 366 (see Pet. App. 56a), provides a schedule of standard exemptions that are unrelated to the number of wage earners in the household.

press provisions of 42 U.S.C. 602(a)(7). The Court stated (416 U.S. at 265 n. 13): "*Rosado* * * * was in no sense intended as a blanket approval of the principle of averaging under AFDC programs without regard to what is being averaged."

2. New York's program is atypical. No more than a few other states derive their medically needy eligibility standards by using standard deductions for items that are treated and deducted on an actual cost basis in categorical assistance cases. Consequently, we believe that the problem illustrated by this case is not widespread and can be handled by the Secretary through negotiation with the participating states or, if necessary, by disapproval of state plans. See 42 U.S.C. 1396a(b). The decision of the court of appeals is correct. It is consistent with the holding of other federal courts on related questions[9] and with the holding of two New York State court decisions involving the precise issue involved here. *Newborn* v. *Toia*, 89 Misc. 2d 409, 391 N.Y.S. 2d 786 (Sup. Ct.); *Sennett* v. *Shang*, No. 362-78, decided March 2, 1978 (Sullivan Cty. Sup. Ct.).[10] There is, therefore, no reason for review by this Court.

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[9] See *Aitchison* v. *Berger*, *supra*; *Dominguez* v. *Milliken*, CCH Medicare and Medicaid Guide ¶ 26,633 (W.D. Mich.); *Schaak* v. *Schmidt*, 344 F. Supp. 99 (E.D. Wisc.); *Wilczynski* v. *Harder*, 323 F. Supp. 509 (D. Conn.); *Dumbleton* v. *Reed*, 40 N.Y. 2d 586, 388 N.Y.S. 2d 893, 357 N.E. 2d 363; *Wong* v. *Brian*, CCH Medicare and Medicaid Guide ¶ 26,605 (Cal. Ct. App.).

[10] *Sennett* cites and follows the court of appeals' decision in the present case. *Newborn* was decided before the court of appeals' decision here (see Pet. App. 4a n. 4).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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